IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 239 of 1995
With
CRIMINAL APPEAL No. 377 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ABDUL RAUF ABDULKARIM RANASIA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
IN CRIMINAL APPEAL NO.239 OF 1995

MR.UMOT, LD. ADVOCATE FOR THE APPELLANT

IN CRIMINAL APPEAL NO.377 OF 1995

MR.K.J.PANCHAL, LD. ADVOCATE FOR THE APPELLANT

MS.PANDIT, LD. ADDL. PUBLIC PROSECUTOR for Opponent-State

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 05/04/2007

ORAL JUDGMENT

Both the present appeals are against the

judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Sabarkantha at Himmatnagar in Summary Case No.3 of 1989, on 8th March, 1995, whereby the appellants-accused were held guilty for the charge of offence punishable under Section 3 read with Section 7 of the Essential Commodities Act, 1955 and were sentenced to undergo simple imprisonment for three months and was ordered to pay a fine of Rs.250/-, in default thereof, to undergo one month imprisonment.

2. Heard Mr.Umot learned Counsel appearing for the appellant of Criminal Appeal No.239 of 1995 and Mr.K.J.Panchal, learned Counsel appearing for the appellant of Criminal Appeal No.377 of 1995. The appellant of Criminal Appeal No.239 of 1995 is original accused No.2 and appellant of Criminal Appeal No.377 of 1995 is original accused No.1. I have also heard Ms.Pandit, appearing in both the appeals for the respondent-State. Both the Counsel appearing for either sides have taken me through the judgment under challenge as well as the evidence led during the course of trial. This Court has also gone through the grounds raised in the memo of both the appeals, so also the say of the appellants in their

defence statements recorded under Section 313 of the Code of Criminal Procedure.

3. To appreciate the rival side contentions, firstly it would be necessary to state the case of the prosecution in brief. The facts emerging from the complaint filed in the Court directly by the complainant, who was the Chief Supply Inspector, Dist: Sabarkantha-Prosecution Witness No.1, Arjunsinh Kesarsinh Padhiar are that the accused persons are serving as a Secretary and a Clerk respectively dealing with the business of control cloth in a co-operative society registered in the name of Vorvad Consumers Co-operative Stores Ltd., Himmatnagar. Both the accused persons were concerned with the business activities of the co-operative societies so far as the purchase, sale and distribution of control cloth is concerned. The Society was directed to sell and market the control cloth within the limit of District Sabarkantha and that too amongst the institutions approved by the authority. There was prohibition for selling the control cloth to any institutions other than approved institutions. The Society did not sell or distribute the control cloth to any private person. The co-operative society had

entered into an agreement of such a nature and they had also agreed to abide by the conditions of the licence granted to the Co-operative Societies by the Collector, Sabarkantha. The society was holding the licence of both the nature viz. as a whole-seller and as a retailer.

3.1 It is further the case of prosecution that during the inspection carried out on 15th April, 1989, certain irregularities were found which were enumerated in the complaint at Exh.1. Both the accused persons were dealing with the business of purchasing, selling and distribution of control cloth and they were prosecuted for violation of conditions of Licence as well as the directions issued by the District Collector, Sabarkantha. It is alleged that by not observing the conditions of the licence as well as by violating the conditions imposed by the District Collector, the accused persons have committed the breach of conditions of Gujarat Essential Articles Dealers (Regulations) Order, 1977 and Gujarat Essential Articles (Licencing Control and Stock Declaration) Order, 1981 and thereby they have committed the offence punishable under Section 3 read with Section 7 of the Essential Commodities Act,

1955.

4. To prove the charges levelled against the appellants-accused, the prosecution has examined seven witnesses. Out of them depositions of some of the witnesses have been read over before the Court and contents of the documents are proved while going through the depositions of the prosecution witnesses including the order of conviction and directions issued by the Collector, Sabarkantha. The prosecution has proved that accused persons in violation of directions and conditions of the licence, had sold control cloth which was to be made otherwise available to the members of the Co-operative Societies under retail licence and then supplied to the institutions and other co-operative societies stores which were in the approved list. It has come on record that the accused persons without taking prior approval of the competent officer, had sold the control cloth in bulk to one Vasudev Vadilal Bhavsar of Kalol. They had also sold the control cloth beyond limit to an individual family. The learned trial Judge has appreciated all these documentary evidence but mainly in the background of three statements of original accused No.1 which was at

Exh.50, 51 and 52 and statements of original accused No.2 which is at Exh.53 and 54. All these statements have been considered to ascertain the truth to bring on record by examining the prosecution witnesses and mainly the complainant and the Officer who had ascertained the nature of irregularities by examining the record seized. The documents of Sabugar Transport Company and other bills of sale of control cloth which are at Exh.56 collectively also support the case of prosecution.

5. After some deliberation and reading the reasons assigned by the learned trial Judge for recording finding against the appellants-accused, the Counsel appearing for both the appellants Mr.Umot and Mr.Panchal under instructions of the clients, submitted that appellants may not press the appeal so far as order of conviction is concerned. Both the appellants have decided not to press the order of conviction.

6. It is, therefore, not necessary to evaluate the evidence pertaining to proof of guilt and therefore the Court is not inclined to comment on the legality and validity-ultimate strength in the conviction recorded by the learned trial Judge. So,

without entering into discussion it is possible for the Court to confirm the order of conviction, as both the appellants have not pressed the appeal so far as order of conviction and proof of guilty is concerned.

7. Alternative argument advanced by Mr.Umot and Mr.Panchal is that while holding both the accused guilty, the learned trial Judge has awarded comparatively harsh punishment. The irregularities which were detected were of the year 1983, 1984 and 1985. For long period they were not prosecuted by the Civil Supply Department and after about lapse of about four years, the complaint was lodged. In the present case the complaint came to be filed in the year 1989 i.e. on 11th September, 1989 and after protracted trial in the year 1995 the Court has recorded conviction i.e. after about 10 years. It was possible for the Court to award minimum punishment by imposing some higher amount of fine though minimum punishment is prescribed under the Act. The learned trial Judge has imposed three months simple imprisonment and ordered to pay a fine of Rs.250/- each and in default thereof to undergo imprisonment for one month. So, this Court can after about of 22 years should give benefit of Section 4 of Probation

of Offenders Act read with Section 361 of the Code of Criminal Procedure. Both the accused were on bail pending trial and they have grown enough old by now. One of the accused is aged about 75 years and another has also crossed the age of 65. Both of them were otherwise working as per the instructions of the member of the governing body and they were paid persons. Just to obtain immunity the members of the governing body had passed formal resolutions making both the accused responsible for purchase and sale of control cloth to the consumers stores run by co-operative society. So, in reality both the accused were victims of the situation created and therefore this Court should take lenient view in the matter.

8. Learned A.P.P., Ms.Pandit has resisted this submission and has argued that both the accused are found responsible for gross irregularities and control cloth of thousand of rupees were sold to private individuals and in one case it was given to a retailer garment manufacturer. When the facts are found so grave and the control cloth was required to be distributed amongst the people of lower strata of the society, the Court should not show any leniency. No harshness is shown in the punishment imposed.

9. When this matter was listed for hearing and submission to grant probation to accused was advanced, this Court has decided to call for the report of Probation Officer qua one of the accused, according to Mr.Panchal who is aged about 75 years and he is also infirm. Wife of the accused is also a heart patient. Both of them are suffering from various ailments. Of course, the imprisonment imposed is simple in nature but the Court should hold that accused may be given advantage. It was their first offence and thereafter no offence or complaint was found to have been lodged against them in connection with any of the activities which can be said to be harmful to the society. Accused No.1 has settled in his life and if he is asked to go to jail, it will bring a great shock to his family and especially to his wife who is a heart patient. The Report is received from the Probation Officer of District Sabarkantha and it is not against him. The other facts are found correct that he is old and infirm.

10. The other accused who has been held guilty is a riot victim. The accused-appellant of Criminal Appeal No.239 of 1995 had suffered a great pain,

shock and financial loss during the last communal disturbance that had taken place in some parts of the State of Gujarat and family members of the accused have also suffered. It is submitted by Mr.Umot that alongwith other aspects this important aspect is required to be considered and the accused may be given the benefit of Section 4 of Probation of Offenders Act.

11. The Apex Court in case of ***Gurmukh Singh etc. Vs. The State of Punjab, reported in A.I.R. 1972 SC 824,*** wherein the Apex Court has decided to modify the sentence. The Court was dealing with a case of selling food articles without licence under Prevention of Food Adulteration Act. The allegation against the accused was that he was found selling articles of food without licence. Alongwith other aspects the Apex Court considered the point of minimum punishment prescribed in paragraph No.9 of the judgment and it would be useful to reproduce the relevant part of paragraph No.9 of the judgment.

> ***"9. On the question of the sentence, it is not denied that the offence with which each of the appellants was charged was committed after the***

amendment of sub-s. (1) of S.16 of the Act under which the sentence has to be a minimum of six months' rigorous imprisonment and a fine of Rs.1000/-, unless it is covered by the proviso to that sub-section in which case a lesser sentence can be given for adequate and special reasons to be mentioned in the judgment. .....

It is not the case of the prosecution that the appellants sold or stored any adulterated or misbranded or prohibited articles of food. Even in such cases if the offence is with respect to an article of food which is adulterated under sub-cl. (1) of cl. (i) of sec. 2 or misbranded under sub-cl. (ix) of sec. 2 a lesser sentence under the proviso can be awarded. As pointed out in Jagdish Prasad v. State of West Bengal, Cri. App. No. 50 of 1969 D/- 13-12-1971 (SC) the offences under the Act being anti-social crimes affecting the health and well being of our people, the Legislature having regard to the trend of courts to impose in most cases only fines or where a sentence of imprisonment was passed a light sentence was awarded even in cases where a severe sentence was called for, a more drastic step was taken by it in prescribing a minimum sentence and a minimum fine to be imposed even for a first offence. The reason for the Legislature to make the exception is not that the offences specified are not considered to be serious but the gravity of the offence having

regard to its nature can be less if there are any special or adequate reasons. In our view, though offences for adulteration of food must be severaly dealt with, no doubt depending on the facts of each case which cannot be considered as precedents in other cases, in this case having regard to the fact that the offence is only one for non-renewal of a licence within a reasonable time, and the appellants as pointed out by the trying Magistrate were only petty traders a mitigation in the sentence is justified. No doubt, as the High Court point out, the reason given by the Trial Court that the accused pleaded guilty and were repentant may not be adequate. But in the special circumstances pointed out by us a lesser sentence is called for. In view of the fact that all the appellants have already served one week's sentence, we think interests of justice would be served if the sentence of six months imprisonment and fine of Rs.1000/- is reduced to a period of imprisonment already undergone by each of them, and to pay a fine of Rs.250/- and in default of which they are directed to undergo a further period of imprisonment for one month. In each of these appeals this sentence is substituted for the sentence awarded by the High Court and the appeals are accordingly allowed to this extent."

11.1 The observation of the above cited decision made by the Apex Court clearly goes to indicate that

while dealing with the sentence imposed upon the accused, the Court should consider the category of case. The Court is aware that protraction of trial or delay in hearing of criminal appeal normally would not come in way of imposition of sentence and that by itself would not be sufficient to reduce the quantum of punishment imposed. But considering the circumstances that may be pointed out to the Court, the lesser punishment can be imposed by the Court. Ultimately, the imposition of punishment, period of punishment and substantive sentence should be able to carry the proper message to the society. But in each case the Court should not be enthusiastic to see that each order of punishment should deter the members of the society.

12. The Apex Court in case of ***Umrao Singh vs. State of Haryana, reported in AIR 1981 SC 1723***, has found that this is a fit case to award sentence lower than the minimum prescribed. In paragraph No.2, the Apex Court has observed thus:

> ***"2. Having regard to these facts, the expression of and the view of the High Court was justified. We accordingly reduce the sentence of the appellant to the period already undergone. The***

sentence, of fine is maintained and we are informed that he has already paid the fine. Since he is already on bail, he should be released forthwith."

12.1 It is true that the plain reading of the judgment, does not give detail that for how much period the appellant-accused had remained in jail but when the Court is of the view that the substantive sentence requires to be reduced, then only the Court has to look into the period already undergone.

13. So, the Court can decide to exercise powers vested with the Court under the provisions of Section 360 of the Code of Criminal Procedure because otherwise also the substantive sentence could have been reduced to any minimum period by assigning detail convincing reasons. When the Court otherwise is competent to reduce punishment than the minimum prescribed, then whether this is a case where the Court should act in reformative manner and exercise powers vested with the Court under the provisions of Section 360 of the Code of Criminal Procedure, is the question.

14. In case of **(The) State of Gujarat Vs.**

Ganpatbhai Premjibahi Joshi, reported in 1998 (2) G.L.H. 787, this Court has observed thus:

> ***"4. In the decision reported in AIR 1975 SC 845, almost similar situation was dealt with by Their Lordship and it was a case under the Prevention of Food Adulteration Act and the benefit was decided to be given.***
>
> ***5. Here also, it may be seen that 1958 Enactment whereby the formal expression of the legislative will to grant benefit of probation was clarified and expressed and in no uncertain terms, for the Enactments which were already on the Statute Book, necessary, reference has been made in Section 18 to exclude them. Essential Commodities Act, 1958 is not one of the Statues referred Commodities Act was very much in force at the time when said Probation of Offenders Act, 1958 came to be enacted, the Parliament, in its wisdom, has chosen not to exclude it.***
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> ***6. Under the circumstances, even the provision for minimum punishment will not come in the way because benefit of probation has to be given to the offenders under the provisions of Indian Penal Code as well as under the provisions of all other Statutes providing for penal offences unless they are specifically excluded either in the Statute itself or under the provisions of the said Probation of Offenders Act. This being***

not the position in relation to the offences under Essential Commodities Act, obviously, the decision taken by the Ld. Spl. Judge cannot be said to be, in any manner, wrong."

15. It is possible to infer that imposition of punishment to a member of family that too eldest and who has reached to the age of 65 years or 75 would bring tremendous mental pressure on each member of the family. The younger generation in the family may probably not be aware about the wrong committed by the elderly persons and shall also face a great social struggle. The alleged offence is of the year 1983 and 1985, detected in the year 1987 and formal prosecution was lodged in the year 1989. So, it is 18 years by now approximately. Of course the irregularities found cannot be termed as small in nature but the same might have been committed in the capacity of servant and at the instance or ill guidance of the persons who were office bearers of the co-operative society. So this is a case where the Court can take some liberal view.

16. Here, the Court would like to refer the decision of the Apex Court in case of **Harivallabha**

and Another Vs. State of Madhya Pradesh, reported in (2005) 10 S.C.C. 330, whereby, placing reliance on this decision this Court has granted benefit of Section 4 of Probation of Offenders Act, read with Section 361 of the Code of Criminal Procedure in case of Munafbhai Mohmad Arif Vohra (Supra). It is not necessary to quote the relevant part of the cited decision. But, the Apex Court has held that in facts and circumstances of the case, the appellant should have been dealt with Section 360 of the Code of Criminal Procedure. The Apex Court confirmed the conviction and sentence of fine but set aside the sentence of imprisonment. Of course in this decision the trial Court was directed to exercise the powers vested under Section 360 of the Code of Criminal Procedure. But, this Court dealing with the appeal against the order of conviction can exercise powers vested with the trial Court in view of Section 360 read with Section 361 of the Code of Criminal Procedure.

17. Mr.Umot has placed reliance on the decision of in case of **Mustufa Suleman Kuskiwala Vs. State of Gujarat, decided on 02/03/2007 by this Court (Coram:**

C.K.Buch, J.) and has read over the paragraph 18 of the said judgment. For the sake of brevity and convenience, the Court would like to reproduce the same.

> *"18. While developing this argument Mr.Joshi, learned Counsel has drawn attention of this Court to paragraph No.3 of affidavit submitted by him and informed to this Court that the appellant is a riot victim, that had disturbed the tranquility of some part of the State of Gujarat in the year 2000-2002. The appellant No.1 had lost huge property and he and his family members were suffered great mental shock and agony and the financial loss to the tune of Rs.15 Lakhs in the year 2000 and Rs.11 Lakhs in the year 2002. The accused had approached the Government for compensation. The accused was residing with his father and brother of the accused was also residing in nearby area. The appellant has also attached the complaint lodged by him before Modasa Town Police Station, Dist: Sabarkantha. The Government Notification dated 26th April, 2002 indicates that brother of the accused-Habib Sulemanbhai and father of the accused-Sulemanbhai Ibrahim being the owner and occupant who had given the financial help of Rs.50,000/- and Rs.16,000/- respectively. The certificate issued by Chief Officer, Modasa Municipality dated 20th April, 2002 clearly shows that the business premises were set on fire and therefore the Municipality had not charged for use of firefighter to the victim. Of course, this is a*

business premises other than the premises that was used by the family of the accused. The appellant-accused had also approached the National Human Right Commission by written complaint dated 21st August, 2000. So, there is ample evidence of reliable nature brought to the notice of the Court from which it is possible to infer that the appellant-accused is a riot victim who belongs to family of riot victim."

17.1 In the very judgment the Court has observed the time gap between the order of conviction and hearing of the Criminal Appeal and he has placed reliance on paragraph 23 of the decision in case of **Mustufa Suleman Kuskiwala (Supra).**

18. Ms.Pandit, learned A.P.P., of course has submitted that as the appellant of Criminal Appeal No.239 of 1995 being a riot victim can be given the benefit of Probation of Offenders Act but not to the other one, who is appellant of Criminal Appeal No.377 of 1995. Here, the say of Mr.Panchal is that this Court may consider one decision in case of **Bhagat Ram Vs. State of Himachal Pradesh of Himachal Pradesh High Court, reported in 1989 CRI.L.J. 2520**, whereby it has been observed in paragraph 18 as under:

"18. Looking to the fact that the offence

was committed on 19-2-1982 and a period of more than seven years has passed and the appellant is an old man of about 75 years, so it is not just to award jail sentence to him. Instead of sentencing the appellant, I, therefore, release him on probation with a direction to keep peace and be of good behaviour for a period of two years under Section 4 of the Probation of Offender Act, 1958.....”

19. So, the old age according to Mr.Panchal is one of the most relevant aspect for granting benefit under Section 4 of the Probation of Offenders Act. In the present case, number of documents have been produced showing that he is not only old but also infirm and handicapped. The health of his wife may not be that relevant but when the Court is concentrating on the aspect whether a person should be sent behind the bar for three months after about 18 to 20 years, then, all other social aspects requires to be considered and therefore only this Court had called for the report of the Probation Officer. All relevant papers are placed before the Probation Officer and it is not the say of the Officer that contention as to ailment of the wife of the accused is incorrect and therefore the Court is inclined to say that the resistance placed by

Ms.Pandit is not acceptable.

20. In case of **State of Karnataka Vs. Muddamppa, reported in 1999 (5) SCC 732,** whereby the Supreme Court refused to interfere with the order of High Court whereby the High Court had granted probation after considering relevant material and had also considered that even after long lapse of time, the accused had not violated any terms of Probation. In this case, the accused was held guilty of the charge of offence punishable under Section 304 Part-II. So, in grave cases the Court can grant the probation and in my view it would be in interest of justice to grant benefit of Probation of Offenders Act, to both the appellants-accused

21. Before concluding with the judgment, the Court would like to quote the some part of observations made by this Court in case of **Mustufa Suleman Kuskiwala (Supra)**.

> *"24. Ms.Pandit, learned A.P.P. has fairly pointed out that it is erroneously mentioned by the learned Judge while recording plea that the accused was dealing with a fair price shop. He was a licence holder and has not been convicted as fair price shop dealer. So the accused was*

not a part of public distribution system otherwise, the Court would not have exercised the discretion in favour of the accused. The Court is inclined to observe that, when it comes to awarding of substantive sentence where the offence is not of that grave nature and the Court finds that accused is a victim of either social or ecological imbalance or disturbance or any disaster beyond control of the accused keeping in mind the basic principle of victimology that has occurred after commission of offence, the Court must assign reasons as to why benefit either under Section 360 read with Section 361 or under Section 4 or 6 as the case may be, has not been given to the appellant-accused. The protraction of trial or hearing of the appeal is not relevant while evaluating the validity and legality of the judgment or considering the quantum of period of punishment, but the conduct of the accused in the period in between can be considered while dealing with the plea of Probation of Offenders Act. If he turns so positive and helpful to the society in an illustrative way, then, application of reformatory school of thoughts would be appropriate by granting benefit under Section 360 read with Section 361 of the Code of Criminal Procedure or under Section 4 and 6 of the Probation of Offenders Act."

22. In the result, both the Criminal Appeals are partly allowed. While confirming the judgment and order of conviction and sentence of fine passed by

the learned Additional Sessions Judge, Sabarkantha at Himmatnagar in Summary Case No.3 of 1989 on 8th March, 1995, the order of substantive sentence is hereby altered.

22.1 The appellants-accused are directed to execute the bond of Rs.5,000/- (Rupees Five Thousand Only) each of good conduct with one surety each of the like amount for the period of two years under the scheme of Section 4 of Probation of Offender Act read with Section 361 of Criminal Procedure Code, 1973. The appellants-accused shall execute the bond of good conduct before the concerned trial Court within a period of 15 days from the date of receipt of the copy of this writ, failing which the trial Court shall issue non-bailable warrant for arrest of the appellants-accused and they will be liable to serve the sentence imposed upon them by the trial Court. The order of substantive sentence shall remain under suspension till the period of bond of good conduct i.e. for two years and shall become inoperative on completion of the period.

22.2 The appellants-accused are also directed that in case of violation of any of the conditions of

the bond of good conduct, the trial Court shall at liberty to issue warrant for serving the sentence imposed by the concerned trial Court.

22.3 The Bail Bond executed by the appellants-accused shall stand discharged on the date on which the appellant-accused executes the bond of good conduct before the trial Court. Order and Direction accordingly.

(C.K.BUCH, J.)

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